UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

H.S. CARE L.L.C., d/b/a OAKWOOD CARE CENTER and
N & W AGENCY, INC.
Joint Employers[1]

and Case No. 29-RC-10101

NEW YORK'S HEALTH AND HUMAN SERVICE
UNION, 1199, SERVICE EMPLOYEES
INTERNATIONAL UNION, AFL-CIO
Petitioner[2]

DECISION AND DIRECTION OF ELECTION

H.S. Care LLC, d/b/a Oakwood Care Center (herein called Oakwood) operates a nursing home in Oakdale, New York. N & W Agency, Inc. (herein called N & W), provides labor and employees to Oakwood and other businesses. The Petitioner, New York's Health and Human Service Union, 1199, Service Employees International Union, AFL-CIO, filed a petition[3] under Section 9(c) of the National Labor Relations Act on September 15, 2003, seeking to represent a unit of the non-professional employees employed by these two employers at the Oakdale facility. Although the employers essentially admit that they operate as joint employers for at least some employees

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1 The Employers' names appear as amended at the hearing. Their status as joint employers is discussed in more detail below.

2 The Petitioner's name appears as amended at the hearing.

employed at the nursing home, and although they admit that the petitioned-for unit of non-professional employees would be an appropriate unit for bargaining under the National Labor Relations Board's decision in M.B. Sturgis, Inc., 331 NLRB 1298 (2000) ("Sturgis"), they nevertheless seek to challenge Sturgis by arguing that they should not be required to engage in joint bargaining without both employers' consent. Oakwood also contends that it does not yet employ a representative complement of employees at its nursing home, and therefore an election would be premature at this time. A hearing was held before Henry Powell, a hearing officer of the Board.

As discussed in more detail below, I find that an election in the petitioned-for unit should proceed, notwithstanding the joint employers' lack of "consent" to joint bargaining. I also find that a representative complement of employees exists at this time.

Facts

No witnesses were called to testify in this case. The parties stipulated to certain representations made by Oakwood's attorney, and to written stipulations of fact (Board Exhibit 2 and Joint Exhibit 1).

There is no dispute that Oakwood opened in August 2002, i.e., more than a year ago. Thus far, the nursing home has filled 152 patient "beds," out of its 280-bed capacity. As a result, even though the nursing home has hired some employees in all relevant classifications, it has hired only 55% of the expected total number of employees in those classifications. The record gives no indication whatsoever of when the home expects to expand.

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[3] The second page of the petition was inadvertently omitted from the formal papers in this case, Board Exhibit 1. The page is attached hereto as Appendix A.

The record does not expressly indicate whether there are non-professional employees at the nursing home who are employed *solely* by Oakwood. However, from the parties' post-hearing briefs, there seems to be no dispute that the petitioned-for unit consists of both (1) employees employed solely by Oakwood and (2) employees employed jointly by Oakwood and N & W. (The record gives no specific indication of how many employees are solely employed or jointly employed, nor in which job classifications.) In any event, the parties stipulated that, as to the non-professional, "Agency-paid" employees who work at the Oakwood facility, both N & W and Oakwood determine their wage rates and benefits. The parties further stipulated that Oakwood determines virtually every other aspect of the "Agency-paid" employees' employment, including supervision, discipline and scheduling. Thus, it is obvious that Oakwood and N & W jointly employ at least some of the non-professional employees. Sturgis, 331 NLRB at 1301 and cases cited therein (joint employers defined as entities who "share or codetermine matters governing essential terms and conditions of employment").

The parties stipulated that the following unit would be an appropriate bargaining unit under Sturgis:

> All full-time and regular part-time[4] non-professional employees, including licensed practical nurses (LPNs), certified nursing assistants (CNAs), orderlies, transporters, maintenance employees, recreational aides, CNA/rehabilitation aides, cooks, dietary employees, housekeeping employees and laundry employees employed by the Employers at 305 Locust Avenue, Oakdale, New York, excluding all registered nurses (RNs) and other professional employees; receptionists, medical records personnel, nursing secretary and other business office clerical employees; confidential

[4] The parties stipulated that "regular part-time" shall be defined as employees who worked for an average of at least four (4) hours per week during the prior thirteen (13) weeks.

employees; guards; shift LPN charge nurses,[5] administrators, managers and supervisors as defined in the Act.

However, both Oakwood and N & W argue that the Region should simply "disregard" Sturgis because, they argue, the case was incorrectly decided.

Discussion -- *Sturgis* issue

In Sturgis, the Board addressed the increased use of companies (such as N & W) that specialize in supplying "temporary" or "contract" workers to augment the work forces of traditional employers (such as Oakwood). In such cases, the "regular" employees (i.e., those employed solely by the "user" employer) may share the same classifications, skills, duties and supervision as the "contingent" employees (i.e., those employed jointly by the "user" and "supplier" employers). Unlike a true "multi-employer" situation requiring the employers' consent, the Board concluded that these two groups of employees do in fact share the same employer, i.e., the user employer, and that to separate "regular" employees from the "temporaries" would create an artificial separation that the Act does not require. Id., 331 NLRB at 1305. Thus, a proposed bargaining unit composed of both (1) employees employed solely by a user employer and (2) employees employed jointly by user and supplier employers, does not require the employers' consent. As long as those two-subgroups of employees otherwise share a community of interest, the unit will be considered appropriate for purposes of collective bargaining. Id.

[5] The parties included an agreement in the written stipulation (Board Exhibit 2) that "there will be no more than one shift LPN Charge Nurse per shift per Unit." This part of the stipulation should be considered a side agreement, but does not properly belong in the unit description.

In this case, the parties do not dispute that the classifications included in the petitioned-for non-professional unit at Oakwood's facility share a community of interest, and would otherwise be considered appropriate under Sturgis. However, the employers urge the Region to disregard Sturgis because, they argue, it was incorrectly decided.

Although Section 9(b) of the Act authorizes the Board to delegate certain powers to regional directors in representation cases, regional directors may not "disregard" clear Board precedent. (*See* Section 102.67(c)(1) of the Rules and Regulations regarding the Board's review of a regional director's decision where there has been a "departure from officially reported Board precedent.") Since Sturgis clearly applies to the facts of this case, I hereby find that the petitioned-for unit is appropriate for the purposes of collective bargaining, notwithstanding the employers' lack of consent. If the Petitioner becomes the certified collective bargaining representative of this unit, then Oakwood and N & W will be required to bargain with the Petitioner over the employees' terms and conditions of employment, to the extent that each employer controls those terms and conditions of employment. Sturgis, 331 NLRB at 1306.

Discussion -- "expanding unit" issue

In considering whether a representation petition is premature due to an employer's anticipated expansion, the Board attempts to balance competing interests between current employees and future employees. As the Board stated in Toto Industries (Atlanta), Inc., 323 NLRB 645 (1997):

> [C]urrent employees should not be deprived of the right to select or reject a bargaining representative simply because the Employer plans an expansion in the near future. The Board, however, does not desire to impose a bargaining representative on

> a number of employees hired in the immediate future, based upon the vote of a few currently employed individuals.

Id. at 645. The Board therefore attempts to determine whether an employee complement is sufficiently "substantial and representative" to warrant an immediate election, considering such factors as the size of the current workforce compared to the size of the ultimate expected workforce; the expected time lapse and rate of expansion until the full complement is reached; the certainty of the expansion;[6] and the number of job classifications requiring different skills which are expected to be filled. Id.

As noted above, the record indicates that the nursing home has hired 55% of its expected workforce, in 100% of the job classifications. There is no record evidence indicating specifically when the workforce will expand or, indeed, indicating with any certainty that it will actually expand.

Although the Board does not use a specific minimum percentage in these cases,[7] I note that a percentage of 55% falls well above the range of what the Board has found to be "substantial and representative" in past cases. For example, in Endicott Johnson of Puerto Rico, Inc., 172 NLRB 1676 (1968), the Board approved an immediate election where the existing complement of 200 employees was only 18% of the expected 1,100 employees. In General Cable Corp., 173 NLRB 251 (1968), the Board approved an immediate election

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6 The Board's consideration of the "certainty" of expansion in these cases is analogous to its requirement of a "definite and imminent" closing in contracting-unit cases. Martin Marietta Aluminum, Inc., 214 NLRB 646 (1974).

7 The expanding-unit cases involving unrepresented employees should not be confused with contract bar cases, where at least 30% of employees must have been employed at the time the contract was executed with the incumbent union in order to bar a rival union's petition. *Compare* General Extrusion Co., 121 NLRB 1165 (1958) with Endicott Johnson de Puerto Rico, Inc., 172 NLRB 1676 (1968).

where the existing complement of 69 employees was 31% of the expected 220 employees. *See also* Gerlach Meat Co., Inc., 192 NLRB 559 (1971)(35% complement is substantial and representative).

Furthermore, the Board does not deprive employees of their right to an immediate election when an employer's plans to expand are indefinite or speculative. Meramec Mining Co., 134 NLRB 1675 (1961); Witteman Steel Mills, Inc., 253 NLRB 320 (1980); Laurel Associates, Inc., d/b/a Jersey Shore Nursing and Rehabilitation Center, 325 NLRB 603 (1998). Here, there is no specific evidence whatsoever regarding the nursing home's purported expansion.

Based on the foregoing, I find that the present complement achieves the desired balance between insuring maximum employee participation in the selection of a bargaining agent, while not depriving current employees of immediate representation, if they so choose. I specifically find that the nursing home's present complement of 55% of its expected complement of non-professional employees in the same classifications is sufficiently substantial and representative to warrant an immediate election. Furthermore, I find the evidence regarding the "certainty" of the home's expansion insufficient to justify delaying the election on those grounds. Accordingly, I deny the Employer's motion to dismiss the petition; and find that a question affecting commerce exists concerning the representation of certain employees of the Employer.

CONCLUSIONS AND FINDINGS

Based upon the entire record in this proceeding, including the parties' stipulations and in accordance with the discussion above, I conclude and find as follows:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and hereby are affirmed.

2. The parties stipulated that H.S. Care, LLC d/b/a Oakwood Care Center is a domestic corporation with its principal office and place of business located at 305 Locust Avenue, Oakdale, New York, and is a nursing home engaged in providing long-term health care and related services to elderly and disabled adults. During the past year, which period represents its annual operations generally, Oakwood derived gross revenues in excess of $100,000, and purchased and received at its New York facility supplies and materials valued in excess of $5,000 directly from points outside the State of New York. The parties also stipulated that Oakwood is a healthcare institution within the meaning of Section 2(14) of the Act.

The parties stipulated that N & W Agency, Inc., is a domestic corporation with its principal office and place of business located at129 South 8th Street, Brooklyn, New York, and has been engaged in the business of providing labor and employees to other business firms. During the past year, N & W provided services valued in excess of $50,000 to Oakwood and other business firms, which firms were directly engaged in commerce, meeting the Board's standards for jurisdiction other than the indirect inflow or outflow standards.

The Employers are engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. The Petitioner, a labor organization, claims to represent certain employees of the Employers.

4. A question affecting commerce exists concerning the representation of certain employees of the Employers within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time[8] non-professional employees, including licensed practical nurses (LPNs), certified nursing assistants (CNAs), orderlies, transporters, maintenance employees, recreational aides, CNA/rehabilitation aides, cooks, dietary employees, housekeeping employees and laundry employees employed by the Employers at 305 Locust Avenue, Oakdale, New York, excluding all registered nurses (RNs) and other professional employees; receptionists, medical records personnel, nursing secretary and other business office clerical employees; confidential employees; guards; shift LPN charge nurses, administrators, managers and supervisors as defined in the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by New York's Health and Human Service Union, 1199, Service Employees International Union, AFL-CIO. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did

not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employers must submit to the Regional Office an election eligibility list, containing the full names

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8 "Regular part-time" shall be defined as employees who worked for an average of at least four (4) hours per week during the 13-week period prior to the issuance of this Decision.

and addresses of all the eligible voters. North Macon Health Care Facility, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office on or before **October 27, 2003.** No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (718) 330-7579. Since the list will be made available to all parties to the election, please furnish a total of **two** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employers must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on **November 3, 2003.** The request may **not** be filed by facsimile.

Dated: October 20, 2003.

/S/ ALVIN BLYER

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